



PTO/SB/21(09-04)

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**TRANSMITTAL
FORM**

(to be used for all correspondence after initial filing)

Total Number of Pages in This Submission

Application Number	09/768,658
Filing Date	January 23, 2001
First Named Inventor	Kenyon
Art Unit	2192
Examiner Name	Nguyen Ba, Hoang Vu A.
Attorney Docket Number	109910-130358

ENCLOSURES (Check all that apply)

<input checked="" type="checkbox"/> Fee Transmittal Form <input checked="" type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment/Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Reply to Missing Parts/ Incomplete Application <input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation <input type="checkbox"/> Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to TC <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input checked="" type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input checked="" type="checkbox"/> Other Enclosure(s) (please identify below): Copy of Declaration of Aloysius T.C. AuYeung dated 6/30/2005 Return Receipt Postcard
Remarks		

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	Schwabe, Williamson & Wyatt, P.C.		
Signature			
Printed name	Robert C. Peck		
Date	January 11, 2006	Reg. No.	56,826

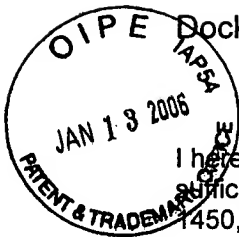
CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:

Signature			
Typed or printed name	Yvette L. Chriscaden	Date	January 11, 2006

This collection of information is required by 37 CFR 1.5. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to 2 hours to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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Docket No.: 109910-130358

MAIL STOP: APPEAL BRIEF-PATENTS

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on the date indicated below.

By:


Yvette L. Chriscaden

Date: January 11, 2006

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Before the Board of Patent Appeals and Interferences

App. No. : 09/768,658 Confirmation No.: 3790
Inventor : Kenyon et al.
Filed : January 23, 2001
Title : ASYNCHRONOUS SOFTWARE UPDATE
Art Unit : 2192
Examiner : Nguyen Ba, Hoang Vu A.
Customer No. : 25,943

MAIL STOP: APPEAL BRIEF-PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

**APPELLANT'S BRIEF IN SUPPORT OF APPELLANT'S APPEAL
TO THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Dear Sir:

This appeal furthers the Notice of Appeal filed on December 28, 2005. The appeal arises from a final decision by the Examiner in the final Office Action, dated September 28, 2005. The final decision was in response to arguments filed on June 30, 2005, in response to an earlier office action, mailed March 31, 2005.

Appellants submit this *Brief on Appeal* in triplicate, including payment in the amount of \$500.00 to cover the fee for filing the *Brief on Appeal*. Appellants respectfully request

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consideration of this appeal by the Board of Patent Appeals and Interferences for allowance of the present patent application.

Real Party in Interest:

This application is assigned to WildTangent, Inc., having a principal place of business at 18578 NE 67th Ct., Redmond, Washington 98052. The assignment is recorded at the United States Patent and Trademark Office, reel 014650, frame 0253.

Related Appeals and Interferences:

To the best of Appellants' knowledge, there are no related appeals or interference proceedings currently pending, which would directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

Status of Claims:

Appellants appeal the rejection of claims 1-24. Claims 1-24 were pending and were rejected in the Final Office Action dated September 28, 2005. Claims 1-24 are reproduced, as pending, in Appendix A.

Summary of the Claimed Subject Matter:

As stated in the first paragraph on page 1 of the specification of the instant application, the invention relates to the distribution and updating of software. A server **102** of the present invention is equipped with a distributor/updater **110** to accept check in by client computers **132** to determine if the client computers' software needs to be updated. The distributor/updater **110** is designed to provide each client computer **132** determined to require an update with a task list **300** listing a number of tasks to be asynchronously performed at a later point or later points in time by the client computer **132** to update the client computer's software. The tasks may include asynchronous subsequent requests of the server **102** or third party servers **122** for software parts. The tasks may also include installation tasks to be performed upon obtaining the required software parts. The client computer **132** is also equipped with a complementary distributor/updater **134**

to perform the periodic check-in and to schedule the update tasks accordingly. In one embodiment, the server's distributor/updater **110** is also designed to be able to regulate its own workload, optionally asking parts-requesting clients **132** to retry later.

Grounds for Rejection to Be Argued On Appeal:

I. Whether claims 1-24 are patentable under 35 U.S.C. §102(e) over the teachings of U.S. Patent Publication No. 2002/0100036 A1 to *Moshir et al.* (hereinafter "Moshir").

Grouping of Claims

For purposes of this appeal, based on the above listed grounds of rejection and their current pending states, all of claims 1-24 stand or fall together.

Arguments:

I. Rejection of claims 1-24 under 35 U.S.C. §102(e) was improper because Moshir is unavailable as a prior art reference under §102(e).

As Appellants noted in their response of October 31, 2005, Moshir was filed on September 20, 2001, about eight months after the instant application. However, Moshir also claims the priority of Provisional Application No. 60/234,680, originally filed September 22, 2000, under 35 U.S.C. § 119(e), less than four months before the instant application was filed. Accordingly, Moshir must find support for each of the portions referenced in the Office Actions in Provisional Application No. 60/234,680.

Even assuming *arguendo* that the cited portions of Moshir are properly supported, Appellants have, in response, submitted a Declaration under 37 C.F.R. § 1.131, supported by corroborating evidence. Both the Declaration and the corroborating evidence are reproduced as attachments to Appendix B of this brief. The Declaration and evidence establish a "reduction to practice" by Appellants prior to September 22, 2000.

The enclosed corroborating evidence comprises a summary of available new features that the patent attorney received from the inventors in the document entitled "Update Service v1.5 Feature List," created by inventor Geoffrey K. Bauman and dated July 18, 2000. Appellants also respectfully note that "Update Service v1.5 Features List" includes features from both version 1.1 and version 1.5 of the Update Service and that those features of version 1.5 were the new features being explained in the July 18, 2000 document.

Despite the Declaration and evidence, the Examiner, in the final Office Action dated September 28, 2005, has maintained the rejection made in the prior March 31, 2005 Office Action. One reason given by the Examiner for maintaining the rejection was that the corroborating evidence provided by Appellants antedated the Moshir reference by only two months and four days. The Examiner suggested that this time period is insufficient to overcome a rejection because Moshir could equally submit an affidavit under 37 C.F.R. § 1.131 antedating Appellants' date of July 18, 2000. Appellants respectfully suggest that Moshir's ability to antedate Appellants' July 18, 2000 date is not relevant (see, e.g., MPEP 715). MPEP 715 states that, in an *ex parte* proceeding such as this, the relevant date that an applicant submitting a 37 C.F.R. § 1.131 must swear behind is the prior art date of the reference under 35 U.S.C. § 102(e). Moshir's prior art date under § 102(e) is September 22, 2000. Thus, any affidavit under § 1.131 accompanied by sufficient corroborating evidence establishing a date prior to September 22, 2000 would be sufficient to overcome a rejection under Moshir. Accordingly, Appellants renew their submission that Moshir is unavailable.

Additionally, the Examiner gave as a further reason for sustaining the above-mentioned rejection the insufficiency of the corroborating evidence supporting Appellants' Declaration. Appellants respectfully submit, contrary to the Examiner's suggestion, that the features claimed in claims 1-24 are present in "Update Service v1.5 Feature List."

Claim 1, for example, requires that a server “accept[] check in by a client computer at a first point in time to determine if the client computer’s software needs to be updated.” This operation is fully supported by paragraph 1 on page 2 of the “Update Service v1.5 Feature List,” which provides that “[a]fter its initial install, [the client] checks into the Update server and checks for newer versions”

Claim 1 further requires that a server “provid[e] the client computer with an update task list listing one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer’s software, if it is determined that the client computer’s software is to be updated.” The “update task list,” though not explicitly referenced, is sufficiently contained by inference within the “Update Service v1.5 Feature List.” Any reply from a server indicating that more than one update should be downloaded would satisfy the requirement that the server provide the client computer with an update task list. Such a reply is disclosed in paragraph 5 on page 3 of the document, where a client signs up for updates to some category of test applications, and when the test applications become available, a client checking in is notified of them and updated to them.

The asynchronous performance of update tasks at a later time or times is also disclosed at least in paragraph 5 on page 2 of the document, which provides for completion at a later time of an installation, if the installation requires the replacement of a file that is in use at the time of installation.

Accordingly, Moshir is believed to be unavailable as a prior art reference against the present invention, as claimed.

II. Rejection of claims 1-24 under 35 U.S.C. §102(e) was improper because Moshir fails to anticipate the invention as claimed in claims 1-24.

It is well settled that anticipation under 35 U.S.C. §102 requires the disclosure in a single piece of prior art to teach each and every limitation of a claimed invention. *Electro Med. Sys. S.A. v. Cooper Life Sciences*, 34 F.3d 1048, 1052, 32 USPQ2d 1017, 1019 (Fed. Cir. 1994). . MPEP 2131 states, "TO ANTICIPATE A CLAIM, THE REFERENCE MUST TEACH EVERY ELEMENT OF THE CLAIM" and "a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

Furthermore, anticipation requires that each claim element must be identical to a corresponding element in the applied reference. *Glaverbel Société Anonyme v. Northlake Mktg & Supply, Inc.*, 45 F.3d 1550, 1554 (Fed. Cir. 1995). Thus, to anticipate the present invention as claimed in claims 1-24, Moshir must disclose every element recited in the pending claims.

Claim 1 calls for, in a server, a method of operation comprising:
accepting check in by a client computer at a first point in time to determine if the
client computer's software needs to be updated; and
providing the client computer with an update task list listing one or more tasks to
be performed by the client computer asynchronously at a later point or
later points in time to update the client computer's software, if it is
determined that the client computer's software is to be updated.

Moshir teaches a method of "discovering software updates, discovering if a given computer can use the software update, and then updating the computers with the software as needed automatically across a network without storing the updates on an intermediate machine within the network." The process is facilitated by an update agent

executing on the target computers (the computers to be updated). The update agent contacts an update server to retrieve from the server a list of update tasks the target computer needs to perform. Upon retrieving a list, the agent begins to automatically download the needed update.

In contrast, the present invention, as claimed in claim 1, recites performing the update “asynchronously, at a later point or later points in time.” Nothing in Moshir teaches or even hints at asynchronous or delayed performance of update tasks by the client computer. The only delays referenced in Moshir are delays by the server in performing its functions (Moshir, paragraphs 61-62). The target computer of Moshir, through its update agent, is not shown to perform the update tasks provided to it “asynchronously, at a later point or later points in time.” Thus, Moshir fails to disclose, in as complete detail as is claimed in claim 1, performing the update “asynchronously, at a later point or later points in time.”

Accordingly, claim 1 is patentable over Moshir.

Claim 13 recites an apparatus performing the operations recited in claim 1. Thus, for at least the same reasons, claim 13 is patentable over Moshir.

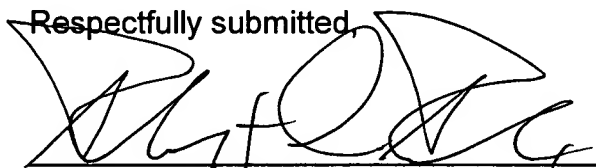
Claims 2-12 and 14-24 depend from claims 1 and 13, incorporating their limitations respectively. Accordingly, for at least the same reasons, claims 2-12 and 14-24 are patentable over Moshir.

Conclusion

Appellants respectfully submit that all the appealed claims in this application are patentable and requests that the Board of Patent Appeals and Interferences overrule the Examiner and direct allowance of the rejected claims.

This brief is re-submitted in triplicate, along with Check Number 13596 for \$500.00 to cover the filing of appeal brief. We do not believe any additional fees, in particular extension of time fees, are needed. However, should that be necessary, please charge our deposit account 500393. In addition, please charge any shortages and credit any overages to Deposit Account No. 500393.

Date: January 11, 2006

Respectfully submitted,

Robert C. Peck, Reg. No. 56,826
Agent for Appellant Applicants

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Seattle, WA 98101
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Appendix A – Appealed Claims

1. (Original) In a server, a method of operation comprising:
accepting check in by a client computer at a first point in time to determine if the client computer's software needs to be updated; and
providing the client computer with an update task list listing one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software, if it is determined that the client computer's software is to be updated.
2. (Original) The method of claim 1, wherein the method further comprises determining if the client computer's software needs to be updated.
3. (Original) The method of claim 1, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise re-contacting the server at a later point or later points in times to retrieve one or more software parts.
4. (Original) The method of claim 1, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise contacting one or more third part servers at a later point or later points in times to retrieve one or more software parts.
5. (Original) The method of claim 1, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise one or more installation tasks to be

performed asynchronously at a later point or later points in time upon asynchronously obtaining one or more software parts.

6. (Previously Presented) The method of claim 1, wherein the method further comprises servicing one or more subsequent asynchronous requests from the client computer for software parts in accordance with the tasks listed in said task list.

7. (Original) The method of claim 6, wherein said servicing comprises asking the client computer to retry one or more of the subsequent asynchronous requests for software parts.

8. (Original) In a client computer, a method of operation comprising:
periodically checking in with a server to determine if the client computer's software needs to be updated;
receiving from the server an update task list listing one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software, upon determining the client computer's software needs to be updated; and
performing said one or more tasks asynchronously at a later point or later points in time to update the client computer's software.

9. (Original) The method of claim 8, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise re-contacting the server at a later point or later points in times to retrieve one or more software parts.

10. (Original) The method of claim 8, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise contacting one or more third part servers at a later point or later points in times to retrieve one or more software parts.

11. (Original) The method of claim 8, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise one or more installation tasks to be performed asynchronously at a later point or later points in time upon asynchronously obtaining one or more software parts.

12. (Original) The method of claim 8, wherein the method further comprises scheduling asynchronous performance of said tasks.

13. (Original) An apparatus comprising:

storage medium having stored therein a plurality of programming instructions designed to accept check in by a client computer at a first point in time to determine if the client computer's software needs to be updated, and to provide the client computer with an update task list listing one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software, if it is determined that the client computer's software is to be updated; and

at least one processor coupled to the storage medium to execute the programming instructions.

14. (Original) The apparatus of claim 13, wherein the programming instructions are further designed to determine whether the client computer's software needs to be updated.

15. (Previously Presented) The apparatus of claim 13, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise re-contacting the apparatus at a later point or later points in times to retrieve one or more software parts.

16. (Original) The apparatus of claim 13, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise contacting one or more third part servers at a later point or later points in times to retrieve one or more software parts.

17. (Original) The apparatus of claim 13, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise one or more installation tasks to be performed asynchronously at a later point or later points in time upon asynchronously obtaining one or more software parts.

18. (Previously Presented) The apparatus of claim 13, wherein the programming instructions are further designed to service one or more subsequent asynchronous requests from the client computer for software parts in accordance with the tasks listed in said task list.

19. (Original) The apparatus of claim 18, wherein said programming instructions are further designed to ask the client computer to retry one or more of the subsequent asynchronous requests for software parts.

20. (Original) A client computer comprising:

storage medium having stored therein a plurality of programming instructions designed to periodically check in with a server to determine if the client computer's software needs to be updated, to receive from the server an update task list listing one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software, upon determining the client computer's software needs to be updated, and to perform said one or more tasks asynchronously at a later point or later points in time to update the client computer's software; and

at least one processor coupled to the storage medium to execute the programming instructions.

21. (Original) The client computer of claim 20, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise re-contacting the server at a later point or later points in times to retrieve one or more software parts.

22. (Original) The client computer of claim 20, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise contacting one or more third part servers at a later point or later points in times to retrieve one or more software parts.

23. (Original) The client computer of claim 20, wherein said one or more tasks to be performed by the client computer asynchronously at a later point or later points in time to update the client computer's software comprise one or more installation tasks to be performed asynchronously at a later point or later points in time upon asynchronously obtaining one or more software parts.

24. (Original) The client computer of claim 20, wherein the programming instructions are further designed to schedule asynchronous performance of said tasks.

Appendix B – Copies of Evidence Submitted

Attached please find a copy of Appellants' Declaration submitted under 37 C.F.R. § 1.131, dated June 30, 2005, establishing a reduction to practice prior to September 22, 2000, and evidence of that prior reduction to practice in the form of the document entitled "Update Service v1.5 Feature List," dated July 18, 2000.



Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

Effective on 12/08/2004.
Fees pursuant to the Consolidated Appropriations Act, 2005 (H.R. 4818).

FEE TRANSMITTAL

For FY 2005

☐ Applicant claims small entity status. See 37 CFR 1.27

TOTAL AMOUNT OF PAYMENT (\$) 500

Complete if Known

Application Number	09/768,658
Filing Date	January 23, 2001
First Named Inventor	Kenyon
Examiner Name	Nguyen Ba, Hoang Vu A.
Art Unit	2192
Attorney Docket No.	109910-130358

METHOD OF PAYMENT (check all that apply)

☒ Check ☐ Credit Card ☐ Money Order ☐ None ☐ Other (please identify): _____

☒ Deposit Account Deposit Account Number: 500393 Deposit Account Name: Schwabe Williamson et al.

For the above-identified deposit account, the Director is hereby authorized to: (check all that apply)

☐ Charge fee(s) indicated below ☐ Charge fee(s) indicated below, except for the filing fee
☒ Charge any additional fee(s) or underpayments of fee(s) under 37 CFR 1.16 and 1.17 ☒ Credit any overpayments

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FEE CALCULATION

1. BASIC FILING, SEARCH, AND EXAMINATION FEES

Application Type	FILING FEES		SEARCH FEES		EXAMINATION FEES		Fees Paid (\$)
	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	
Utility	300	150	500	250	200	100	
Design	200	100	100	50	130	65	
Plant	200	100	300	150	160	80	
Reissue	300	150	500	250	600	300	
Provisional	200	100	0	0	0	0	

2. EXCESS CLAIM FEES

Fee Description	Fee (\$)	Small Entity Fee (\$)
Each claim over 20 (including Reissues)	50	25
Each independent claim over 3 (including Reissues)	200	100
Multiple dependent claims	360	180

Total Claims Extra Claims Fee (\$) Fee Paid (\$)

____ - 20 or HP = ____ x ____ = ____

HP = highest number of total claims paid for, if greater than 20.

Indep. Claims Extra Claims Fee (\$) Fee Paid (\$)

____ - 3 or HP = ____ x ____ = ____

HP = highest number of independent claims paid for, if greater than 3.

3. APPLICATION SIZE FEE

If the specification and drawings exceed 100 sheets of paper (excluding electronically filed sequence or computer listings under 37 CFR 1.52(e)), the application size fee due is \$250 (\$125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

Total Sheets Extra Sheets Number of each additional 50 or fraction thereof Fee (\$) Fee Paid (\$)

____ - 100 = ____ / 50 = ____ (round up to a whole number) x ____ = ____

4. OTHER FEE(S)

Non-English Specification, \$130 fee (no small entity discount)

Other (e.g., late filing surcharge): Appeal Brief Filing Fee

500

SUBMITTED BY

Signature

Registration No.
(Attorney/Agent)

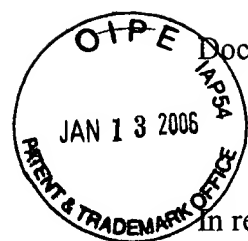
Telephone 503 222 9981

Name (Print/Type) Robert C. Peck

Date January 11, 2006

This collection of information is required by 37 CFR 1.136. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 30 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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Docket No.: 109910-130358

Applic. No. 09/768,658

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:

Kenyon, et al.

Application No.: 09/768,658

Filed: January 23, 2001

Title: **ASYNCHRONOUS
SOFTWARE UPDATE**

Examiner: Nguyen Ba, Hoang Vu A

Art Unit: 2192

Attorney Docket No. 109910-130358

Customer No. : 25,943

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

DECLARATION UNDER 37 C.F.R. § 1.131

The undersigned, Aloysius T.C. AuYeung, hereby declares and states:

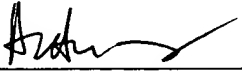
1. The undersigned personally wrote or supervised the writing of the patent application.
2. The invention of the above-identified application was "reduced to practice" before
September 22, 2000.
3. At least as early as **July 18, 2000**, having earlier conceived the idea of an Asynchronous Software Update Service to:

accept check in by a client computer at a first point in time to determine if
the client computer's software needs to be updated; and
provide the client computer with an update task list listing one or more
tasks to be performed by the client computer asynchronously at a
later point or later points in time to update the client computer's
software, if it is determined that the client computer's software is to
be updated.

The invention of the above-identified application was "reduced to practice" at least as
early as **July 18, 2000**, as evidenced by the summary of available new features the

undersigned received from the inventors in the "Update Service v1.5 Feature List" created by Geoffrey K. Bauman, one of the Inventors, and dated **July 18, 2000**.

4. The undersigned declares that all statements made herein of his own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001 and such willful false statements may jeopardize the validity of the application or any patent issued thereon.



Aloysius T.C. AuYeung

Date: 6/30, 2005.



Update Service v1.5 Feature List

Created: 7/18/00
Author: geoffba

Current Features in v1.1

Download and install a new application

The Updater can be installed via internet, CD ROM, floppy, etc and once installed follows the instructions of the install package it resides in to install further applications or features. After its initial install, it checks into the Update server and checks for newer versions, which will trigger an update which can download new files and replace existing files

Update and install (or patch) an existing application

Once an application is installed and registered for updates (registration occurs on the local machine in a open text config file), then the Updater will check the Update server for newer versions for that specific application. When a newer version is found, new files are downloaded and an application update process is started.

Currently 2.2+ million users, and growing

WildTangent uses the Updater as its primary channel of distribution for keeping the WebDriver technology drivers up to date. The v1.1 system has the capability of achieving near total update of an entire driver set for all 2.2+ million users in under 2 weeks with no action required on the users part.

Files replaced by an update are backed up locally for recovery purposes

All files that are replaced, altered, deleted, etc may be first copied in original form to a backup directory to aid in recovery and troubleshooting of an install or patch that does not complete successfully.

Files in use (such as library DLLs) are marked and taken care of at next startup

This is to aid in the deletion or replacement of files such as video drivers, audio drivers, code libraries, executables, or other such files that are in use at the time of install. A standard "Please reboot the system now to complete the install" dialog box will pop up only in these cases, and the user will be notified that a reboot will be required for the install to complete.

New Features in v1.5

Updater Service\Registration\Usage by Vendors

While the v1.1 Updater system was intended for and usable only by WildTangent, the new v1.5 Updater Service system will be designed and built for Vendors to utilize the system for their own applications and update packages.

Uninstall

An uninstall script will be configured and setup for each individual install and can be accessed by the standard Windows methods for uninstalling applications.

Improved Flexibility and Structure of the Install package

Multiple applications can now be packaged to install together, and in a specified order. This will allow for more discrete levels of installs and uninstalls, instead of having to install large groups of applications as a single package.

Set the update time cycle of each application individually

The frequency by which the updater client checks the server for an update can be set at install time by the application vendor, or changed by the user via the WildTangent control panel. These settings can be overridden by the server to set longer check-in intervals during peak usage, etc.

Backwards compatibility with previous WildTangent Updater versions

Even if an older version of the Updater client is detected checking in, it is handled by being instructed to update itself to the new version. After all, we must be able to update the updater, now and into the future.

Targeted updates via a code entered by user (Phasekey)

To be able to implement programs like a classic Beta release, Phasekey functionality has been included in the WildTangent Updater control panel per application. It takes the form of having a field where the user can enter a code (published via email, website, magazine, drop mail, etc) to allow them participate in a particular limited release program for that application. For example, if a set of graphics drivers were in an early release program intended to provide developers on top of the drivers to be able to develop and test their content, the developers could be informed via email that they could enter "WEBDRIVER_2_RC1" into their control panel assuming they already registered for WebDriver updates, and they would then get updated to the test drivers without also updating the entire user base. A phasekey can also be specified in an install package to ensure that the user is on the beta path.

Distributed application check-in and file download server capability

To distribute load, improve geographical download performance, and improve redundancy and reliability, application check-in and file download servers can be specified separate from the Update Service Check-In servers. As well, multiple check-in and download servers can be specified and if one is busy or unresponsive, another in the list will be tried.